

Guideline Sentencing Update



FEDERAL JUDICIAL CENTER

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Offense Conduct

Second and Sixth Circuits split on whether drug quantity must be found by the jury or sentencing court when quantity determines whether a conviction for possession of crack is a felony or misdemeanor. Both defendants were acquitted of possession with intent to distribute crack cocaine but convicted of the lesser included offense of simple possession of crack cocaine—a misdemeanor for amounts under five grams if defendant has no prior drug convictions but a felony with a five-year minimum sentence for more than five grams. See 21 U.S.C. § 844(a). Neither jury verdict specified the amount of crack that defendants were guilty of possessing. Each district court found there was more than five grams involved and sentenced defendants under the Guidelines. Both defendants appealed, claiming that quantity is an element of the offense and must be found by the jury.

The Second Circuit rejected that claim, holding “that quantity is not an element of simple possession because § 844(a) prohibits the possession of any amount of a controlled substance, including crack. . . . The task of determining how much drugs Monk was carrying falls to the sentencing judge. He, therefore, had to find that Monk possessed more than 5 grams of crack in order to treat the crime as a felony.” The appellate court noted that “it is beyond cavil” that more than five grams was involved, since defendant essentially admitted to possessing 340 grams, claiming only that he had no intent to distribute. In addition, the indictment specifically alleged possession of 50 grams and the jury returned a special verdict form of guilty “as charged in the indictment.”

U.S. v. Monk, No. 93-1349 (2d Cir. Jan. 24, 1994) (McLaughlin, J.).

The Sixth Circuit, however, concluded that “the amount possessed constitutes an element of the offense.” It would be “an impermissible usurpation of the historic role of the jury” to allow a defendant to “be convicted of a felony, as opposed to a misdemeanor, on the strength of a sentencing judge’s factual finding on the amount of crack cocaine possessed by the defendant. . . . The felony of which Mr. Sharp was convicted . . . was a ‘quantity dependant’ crime, . . . and the facts relevant to guilt or innocence of that crime—including possession of a quantity of crack cocaine exceeding five grams—were for the jury to decide.” *Accord U.S. v. Puryear*, 940 F.2d 602, 604 (10th Cir. 1991) (“We conclude that drug quantity constitutes an essential element of simple possession under section 844(a). . . . Absent a jury finding as to the amount of cocaine, the trial court may not decide of its own accord to enter a felony conviction and sentence, instead of a misdemeanor conviction and sentence, by resolving the crucial element of the amount of cocaine against the defendant”).

U.S. v. Sharp, No. 93-5117 (6th Cir. Dec. 28, 1993) (Nelson, J.).

See *Outline* generally at II.A.3.

Adjustments

ACCEPTANCE OF RESPONSIBILITY

Fifth Circuit holds that where defendant met three-part test for additional one-level reduction under § 3E1.1(b), district court had no discretion to deny that reduction because defendant had also obstructed justice. Defendant lied about his prior criminal record in his presentence interview, and was assessed a two-point enhancement for obstruction of justice under § 3C1.1. Despite that, the district court awarded the two-point reduction for acceptance of responsibility. Because of the obstruction, however, the court refused the extra one-point reduction under § 3E1.1(b), which defendant otherwise qualified for because of his timely plea and cooperation.

The appellate court devised a three-step test to determine whether a defendant qualifies for the § 3E1.1(b) reduction. The first two steps, which were not in dispute here, are that a defendant qualifies for the two-point reduction under § 3E1.1(a) and has an offense level of 16 or greater before that reduction. The third step is met by “(1) timely providing complete information to the government concerning his own involvement in the offense, or (2) timely notifying authorities of his intention to enter into a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.” See § 3E1.1(b). The issue here was whether defendant satisfied (2).

Based on the language of § 3E1.1(b) and accompanying Application Note 6, the court concluded “that the timeliness required . . . applies specifically to the governmental efficiency to be realized in two—but only two—discrete areas: 1) the prosecution’s not having to prepare for trial, and 2) the court’s ability to manage its own calendar and docket, without taking the defendant’s trial into consideration. Of equal importance in the instant case is that which the timeliness of step (b)(2) does not implicate: time efficiency for any other governmental function, including without limitation the length of time required for the probation office to conduct its presentence investigation, and the ‘point in time’ at which the defendant is turned over to the Bureau of Prisons to begin serving his sentence.”

Therefore, it was error to deny the extra deduction because defendant’s obstruction may have delayed the presentence report and the beginning of his incarceration: “[A]s long as obstruction does not cause the prosecution to prepare for trial or prevent the court (as distinguished from the probation office) from managing its calendar efficiently, obstruction of justice is not an element to be considered. . . . [A] defendant who has satisfied all three elements of subsection(b)’s tripartite test is entitled to—and shall be afforded—an additional 1-level reduction.”

U.S. v. Tello, 9 F.3d 1119 (5th Cir. 1993).

In another case, the Fifth Circuit used “the *Tello* test” to reverse a denial of a § 3E1.1(b) reduction. The district court granted a two-level reduction but denied the additional reduction, apparently because it mistakenly thought defendant’s offense level was not 16 or higher. The appellate court determined that defendant’s offense level “indisputably was above 16” and concluded that defendant also met the third step of the *Tello* test: “Mills clearly took the step defined in subsection (b)(2) when . . . less than a month after his arraignment and only six weeks after he was charged . . . he notified authorities of his intention to enter a plea of guilty. . . . Having thus satisfied all three prongs, Mills was entitled—as a matter of right—to the third 1-level reduction in his offense level. . . . [T]he court was without any sentencing discretion whatsoever to deny Mills the third 1-level decrease.” Because “the sentencing court left no doubt that, as far as it was concerned, Mills should be incarcerated for the maximum term permitted under the applicable Guidelines range,” instead of remanding the appellate court chose to “reverse the term of incarceration imposed by the district court, modify that term to one of 30 months—the maximum within the correct sentencing range—and affirm Mills’ sentence as thus modified.”

U.S. v. Mills, 9 F.3d 1132 (5th Cir. 1993).

See *Outline* generally at III.E and X.D.

Departures

MITIGATING CIRCUMSTANCES

U.S. v. Newby, No. 92-5711 (3d Cir. Nov. 30, 1993) (Cowen, J.) (Affirmed: The district court properly refused to consider downward departure for inmate-defendants who, in addition to the penalty for their instant offenses, would lose good time credits as an administrative penalty for the same conduct. “Loss of good time credits is not a factor that relates to the defendants’ guilt for their conduct; the defendants’ being sanctioned administratively does not show that they were morally less culpable of the charged crime. . . . [P]rison disciplinary sanctions through loss of good time credit do not constitute a proper basis for a downward departure.” The appellate court refused to follow *U.S. v. Whitehorse*, 909 F.2d 316, 320 (8th Cir. 1990) (“District Court did not err in considering the loss of good time as one of the aggregate of mitigating factors justifying a downward departure in this case”). See *Outline* generally at VI.C.4.

U.S. v. Crook, 9 F.3d 1422 (9th Cir. 1993) (Remanded: Defendant pled guilty to manufacturing 751 marijuana plants. The district court departed downward two offense levels on the grounds that defendant had grown the marijuana for his personal use and the Guidelines did not take into account that a defendant could lose his home—which was not acquired with proceeds from drug sales—through civil forfeiture. (Note: On this issue the court cited *U.S. v. Shirk*, 981 F.2d 1382 (3d Cir. 1992), as support, but that case has been vacated. See last item.) The appellate court held that “the Guidelines do not allow for departure on account of civil forfeiture.” Also, the district court clearly erred in finding that the marijuana was for defendant’s personal use. Even using a conservative estimate, it was five times more than defendant could use at his admitted rate of smoking—“we are convinced by the size of Crook’s marijuana crop that he must have been manufacturing marijuana, at least in part, for sale or distribution.”). See *Outline* at VI.C.1.i and 4.b.

U.S. v. One Star, 9 F.3d 60 (8th Cir. 1993) (Affirmed: Downward departure to five years’ probation for defendant convicted of being a felon in possession of a firearm was properly based on combination of factors and “the unusual mitigating circumstances of life on an Indian reservation noted . . . in *U.S. v. Big Crow*, 898 F.2d 1326, 1331–32 (8th Cir. 1990).” Defendant did not appear to present a danger to the community, especially with a no-alcohol condition of probation. He had strong family ties and responsibilities—including the sole support of nine family members—and a good employment record. Defendant also “submitted a resolution by the Rosebud Sioux Tribe and numerous letters from tribal officers and others praising his work record and contributions to the community and urging that he not be incarcerated.” The appellate court also rejected the government’s contention “that the degree of departure was unreasonable because it requires a reduction from offense level twenty to offense level eight to make One Star eligible for a sentence of probation. . . . The maximum prison term for a violation of § 922(g)(1) is ten years. See 18 U.S.C. § 924(a)(2). Therefore, the district court had statutory authority to sentence One Star to probation. See 18 U.S.C. §§ 3559(a), 3561(a). That being so, and its findings being legally sufficient to warrant a departure, the court’s decision to impose probation ‘is quintessentially a judgment call.’ . . . Though the district court’s decision to depart and the extent of its departure no doubt approach the outer limits of its sentencing discretion under the Guidelines, we conclude that One Star’s sentence was a reasonable exercise of that discretion.”).

See *Outline* at VI.C.1.a and e, 3, and D.

Criminal History

CAREER OFFENDER PROVISION

U.S. v. Calverley, No. 92-1175 (5th Cir. Dec. 29, 1993) (Garza, J.) (Affirmed: Defendant, convicted of possession of a listed chemical with intent to manufacture a controlled substance under 21 U.S.C. § 841(d)(1), was properly sentenced as a career offender. “[W]e hold that a sentencing court, in determining whether an offense is a controlled substance offense under § 4B1.2(2), may examine the elements of the offense—though not the underlying criminal conduct—to determine whether the offense is substantially equivalent to one of the offenses specifically enumerated in § 4B1.2 and its commentary. . . . [P]ossession of a listed chemical with intent to manufacture a controlled substance . . . is substantially similar to attempted manufacture of a controlled substance, and is therefore a controlled substance offense within the meaning of U.S.S.G. § 4B1.2.” The court refused to follow *U.S. v. Wagner*, 994 F.2d 1467, 1474–75 (10th Cir. 1993) [5 *GSU* #14], which held that § 841(d) is not a controlled substance offense under § 4B1.2(2) and should not be treated as an attempt to manufacture a controlled substance.).

See *Outline* at IV.B.2.

Certiorari Granted and Judgment Vacated:

U.S. v. Shirk, 981 F.2d 1382 (3d Cir. 1992), certiorari granted and judgment vacated by *Shirk v. U.S.*, No. 92-1841 (U.S. Jan. 18, 1994), for rehearing in light of *Ratzlaf v. U.S.*, No. 92-1196 (U.S. Jan. 11, 1994). Please delete reference to *Shirk* in *Outline* at VI.C.4.b.